

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



WILLARD PARK,

Charging Party,

v.

INLANDBOATMANS' UNION OF THE PACIFIC,

Respondent.

Case No. SF-CO-191-M

PERB Decision No. 2297-M

December 12, 2012

Appearance: Willard Park, on his own behalf.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Willard Park (Park) to the proposed decision (attached) of a PERB administrative law judge (ALJ) dismissing his unfair practice charge and complaint. The complaint issued by the Office of the General Counsel alleged that the Inlandboatmans Union of the Pacific (IBU)¹ breached its duty of fair representation under the Meyers-Milias-Brown Act (MMBA)² by failing to pursue a grievance it filed on Park's behalf against his former employer, the Golden Gate Bridge, Highway and Transportation District (District), concerning the District's decision to remove Park from a dispatch list based upon allegations of insubordination and sexual harassment. The ALJ determined that IBU did not

¹ In his exceptions, Park contends that the ALJ improperly referred to the respondent by the acronym "IUP" rather than "IBU" (presumably standing for "Inlandboatmans Union"). We find no merit to this objection, as the designation accurately reflects the initial letters of respondent's organizational name. In any event, any discrepancy in the acronym used to designate the respondent in this case has no bearing on the merits of the dispute before us. Without deciding the proper acronym, we defer to Park's apparent preference and refer herein to the respondent as "IBU."

² The MMBA is codified at Government Code section 3500 et seq.

breach its duty of fair representation in its handling of Park's grievance and by withdrawing from representation after it determined that Park's conduct made success unlikely.

The Board has reviewed the proposed decision and the record in light of Park's exceptions and the relevant law. Based on this review, we find the ALJ's proposed decision to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the ALJ's proposed decision as the decision of the Board itself, supplemented by the discussion below of Park's exceptions.

DISCUSSION

Request to Recuse ALJ

Prior to the hearing before the ALJ, Park requested that the ALJ recuse himself from hearing this matter because the ALJ had presided over a related case involving an unfair practice charge filed by Park against the District. (PERB Case No. SF-CE-598-M.)³ On September 1, 2010, the ALJ denied the request.

Although not formally labeled an exception, Park appears to renew his claim that the ALJ should have recused himself in this case because he ruled in favor of the District in the prior proceeding. PERB Regulation 32155⁴ provides, in relevant part:

Disqualification of Board Agent or Board Members.

(a) No Board member, and no Board agent performing an adjudicatory function, shall decide or otherwise participate in any case or proceeding:

(4) When it is made to appear probable that, by reason of prejudice of such Board member or Board agent, a fair and impartial consideration of the case cannot be had before him or her.

³ No exceptions to the ALJ's proposed decision were filed in that case, and it became final.

⁴ PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

(c) Any party may request the Board agent to disqualify himself or herself whenever it appears that it is probable that a fair and impartial hearing or investigation cannot be held by the Board agent to whom the matter is assigned. Such request shall be written, or if oral, reduced to writing within 24 hours of the request. The request shall be under oath and shall specifically set forth all facts supporting it. The request must be made prior to the taking of any evidence in an evidentiary hearing or the actual commencement of any other proceeding.

If such Board agent admits his or her disqualification, such admission shall be immediately communicated to the General Counsel or the Chief Administrative Law Judge, as appropriate, who shall designate another Board agent to hear the matter.

Notwithstanding his or her disqualification, a Board agent who is disqualified may request another Board agent who has been agreed upon by all parties to conduct the hearing or investigation.

(d) If the Board agent does not disqualify himself or herself and withdraw from the proceeding, he or she shall so rule on the record, state the grounds for the ruling, and proceed with the hearing or investigation and the issuance of the decision. The party requesting the disqualification may, within ten days, file with the Board itself a request for special permission to appeal the ruling of the Board agent. If permission is not granted, the party requesting disqualification may file an appeal, after hearing or investigation and issuance of the decision, setting forth the grounds of the alleged disqualification along with any other exceptions to the decision on its merits.

(h) Any party aggrieved by a determination made pursuant to subsections (d) or (g) of this rule may include the matter of claimed disqualification in a writ of extraordinary relief filed pursuant to Government Code Section 3509.5, 3520, 3542, 3564, 71639.4 or 71825.1 or Public Utilities Code section 99562 seeking judicial review of the Board's decision on the merits.

Park did not file an appeal from the ALJ's determination pursuant to PERB

Regulation 32155(d) or (h). Park provides no facts indicating that, by reason of prejudice, the ALJ was unable to give a fair and impartial consideration of the merits of the instant case before him. (*Gonzales Union High School District* (1985) PERB Decision No. 480 [making factual findings with which a party to a proceeding disagrees is insufficient, as a matter of law,

to establish bias or prejudice].) Accordingly, we find no basis upon which to disturb the ALJ's decision not to disqualify himself.

Denial of Request to Recall Witnesses

Park asserts that, prior to the close of the hearing before the ALJ, he requested to recall three witnesses and also to call IBU's attorney, Dmitri Iglitzin (Iglitzin), as a witness.⁵ Park concedes that, in an e-mail dated April 17, 2012, he requested to withdraw his requests to call the additional witnesses, including Iglitzin, provided that an e-mail dated April 16, 2012, from Iglitzin addressed to both Park and the ALJ be admitted into evidence. The e-mail from Iglitzin states, among other things, that Iglitzin represented IBU exclusively, did not represent Park at any time, did not take any actions related to Park other than advising IBU, and that he had no pertinent non-privileged testimony to give on Park's behalf. On April 17, 2012, having heard no objection from Iglitzin, the ALJ granted Park's request.

Park appears to argue that the ALJ erred in failing to consider the April 16, 2012 e-mail from Iglitzin or to include it on the list of exhibits admitted at the hearing. Given the ALJ's April 17, 2012 communication, we deem the April 16, 2012 e-mail admitted into the record in this case.

Park further appears to argue that Iglitzin's statements in the April 16, 2012 e-mail that he was representing IBU, not Park, establishes a violation of the duty of fair representation. The duty of fair representation does not require the union to provide a representative of the grievant's choice. (*American Federation of Teachers College Guild, Local 1521 (Saxton)* (1995) PERB Decision No. 1109.) The fact that Iglitzin represented IBU in the instant charge filed against it by Park has no bearing on whether or not IBU previously violated its duty of fair representation in its handling of Park's grievance. Moreover, the fact that IBU chose to

⁵ Based upon the record before us, it appears that Park requested to recall two witnesses, plus Iglitzin.

provide another representative to handle Park's dispute does not establish a violation of the duty of fair representation.

IBU Newsletter

At the hearing before the ALJ, Park introduced into evidence an IBU Newsletter from the spring of 2010 that Park contends was put out by IBU Regional Director Marina Secchitano and contains an article concerning internal charges brought against Park by IBU. Park excepts to the ALJ's failure to consider this exhibit and appears to argue that it indicates animosity by IBU against him.⁶ We find no error in the ALJ's analysis of the evidence presented and find that the publication of the Newsletter has no bearing on the issue of whether IBU breached its duty of fair representation in its handling of Park's grievance.

IBU's Grievance Handling

The remainder of Park's exceptions dispute the ALJ's determination that the evidence did not establish that IBU's conduct was arbitrary, discriminatory, or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258 (*Collins*); *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M (*Attard*)). Park denies the underlying factual basis of the District's decision to remove him from the dispatch list based upon allegations of insubordination and sexual harassment. In addition, Park disputes IBU's determination that it would be best to try to "maintain the status quo," rather than aggressively litigate the District's decision to remove him from the dispatch list, as well as its ultimate determination that further processing of the grievance would be futile in light of Park's conduct during the proceedings.

⁶ Park's allegations concerning the internal union disciplinary matter were dismissed by the Office of the General Counsel in this case and not appealed. Therefore, the propriety of IBU's actions in that proceeding are not before us.

In order to state a prima facie violation of the duty of fair representation, Park must show that IBU's conduct was arbitrary, discriminatory, or in bad faith. (*Collins, supra*, PERB Decision No. 258.) As stated by the Board in *Collins*:

Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations.]

A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citation.]

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a charging party:

must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment.

(*Reed District Teachers Association, CTA/NEA (Reyes)* (1983) PERB Decision No. 332, p. 9, quoting *Rocklin Teachers Professional Association (Romero)* (1980) PERB Decision No. 124; emphasis in original.)

The Board has held that a union's decision not to take a grievance to arbitration is lawful where a rational basis for the decision exists. (*Castro Valley Unified School District* (1980) PERB Decision No. 149.) Because the charging party bears the burden of proof that a violation of the MMBA has occurred, PERB will dismiss a complaint alleging a violation of the duty of fair representation unless the employee establishes that the union's determination was without a rational basis or devoid of honest judgment. (*Service Employees International Union Local 616 (Jeffers)* (2004) PERB Decision No. 1675-M; *Sacramento City Teachers Association (Fanning, et al.)* (1984) PERB Decision No. 428 [dismissal of charge].) In

determining whether that standard is met, PERB does not determine whether the union's decision was correct but whether it "had a rational basis, or was reached for reasons that were arbitrary or based upon invidious discrimination." (*California School Employees Association & its Chapter 168 (Gibson)* (2010) PERB Decision No. 2128 (*California School Employees Association*); see also *Vaca v. Sipes* (1967) 386 U.S. 171, 195 [holding that "a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious"].) The burden is on the charging party to show how a union abused its discretion; it is not the union's burden to show that it properly exercised its discretion. (*United Teachers - Los Angeles (Wylar)* (1993) PERB Decision No. 970.)

We agree with the ALJ's determination that, given the wide latitude accorded a union in the representation of its members, the evidence presented did not establish a breach of the duty of fair representation with respect to IBU's handling of Park's grievance. IBU participated actively in attempting to resolve the dispute between Park and his employer. While Park may have disagreed with IBU's strategy in attempting to obtain a mediated reinstatement, we agree with the ALJ that the evidence failed to establish that IBU's conduct was "without a rational basis or devoid of honest judgment." (*Attard, supra*, PERB Decision No. 1474-M.) Likewise, we agree that IBU's decision to withdraw representation based upon its belief that Park's conduct made further success unlikely had a rational basis and that there is no evidence that it was otherwise arbitrary or based on invidious discrimination. (*California School Employees Association, supra*, PERB Decision No. 2128.) Therefore, we affirm the dismissal of the complaint and underlying charge.

ORDER

The unfair practice charge and complaint in Case No. SF-CO-191-M are hereby
DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



WILLARD PARK,

Charging Party,

v.

INLANDBOATMEN'S UNION OF THE
PACIFIC,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CO-191-M

PROPOSED DECISION
(5/10/2012)

Appearances: Willard Park, in propria persona; Schwerin Campbell Barnard Iglitzin & Lavitt by Dimtiri Iglitzin, Attorney, for Inlandboatmen's Union of the Pacific.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Willard Park initiated this case under the Meyers-Milias-Brown Act (MMBA or Act)¹ on February 9, 2009, by filing an unfair practice charge against the Inlandboatmen's Union of the Pacific (IUP). An amended charge was filed on February 17, 2010. On March 16, 2010, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that IUP breached its duty of fair representation by failing to continue representing Park in regard to a grievance.² This conduct is alleged to violate sections 3506 and 3509(b) of the Act and PERB Regulation 32604(b).³

¹ The MMBA is codified at Government Code section 3500 et seq. Hereafter all statutory references are to the Government Code unless otherwise indicated.

² Allegations that IUP retaliated against Park for protected activity, denied him membership, and interfered with the rights of another employee were dismissed by the Board agent.

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

On April 6, 2010, IUP filed its answer to the complaint, denying the material allegations.

On April 28, 2010, an informal settlement conference was held, but the matter was not resolved.

On three non-consecutive days between August 9, 2011 and April 25, 2012, a formal hearing was conducted in Oakland by the undersigned. The matter was submitted for decision at the close of the hearing.

FINDINGS OF FACT

Park is a “public employee” within the meaning of section 3501(d). IUP is an “employee organization,” within the meaning of section 3501(a), and an “exclusive representative” of a bargaining unit of public employees, within the meaning of PERB Regulation 32016(b).

Park was employed by the Golden Gate Bridge, Highway and Transportation District (District) as a casual deckhand in August 2008. Deckhands obtain work on the District’s ferry boats by bidding for work assignments at the IUP hiring hall.

Marina Secchitano is IUP’s Regional Director for the San Francisco region. She is responsible for providing representation to members of the union.

On August 7, 2008, Park’s supervisor, Cindy Amadea, relieved Park of duty based on allegations of insubordination toward the ship’s captain and sexual harassment of another deckhand, Sandy Ailes. The allegations were that Park raised the boat’s flag upside down (a maritime distress signal), and, after arguing with Ailes on the vessel, stuck his tongue out at her in a sexual manner when he departed work. Amadea contacted Secchitano by telephone after the work shift and instructed her to bar IUP from granting Park any new assignments.

Based on the report, Secchitano believed that Park would be eligible for assignments sometime in the future.

On August 8, 2008, Park drafted his own grievance, characterizing Amadea's directive as a more serious action, namely, that he was "fired without just cause" and made "undispatchable." He checked a box describing the nature of the employer's action as a "discharge." Park further asserted he was unable to answer the charges against him unless they were reduced to writing. He did not cite a specific provision of the collective bargaining agreement alleged to have been violated, though he referenced the "contract rule on terminatio[n]." He demanded a full make-whole remedy.

Secchitano was aware of Park's reputation as a longtime active union member. She testified she bore no animosity towards him. Park has been active in the internal affairs of the union, serving in elected positions, and writing a dissident newsletter entitled "The Hurricane" beginning in the late 1960s. Secchitano acknowledged that Park had accomplished "some good things" on behalf of the members.

Secchitano determined that it would not be wise to file Park's grievance since there had been no notification that Park had been terminated. Nevertheless, Secchitano assumed representation of Park in the dispute. She spoke with Tony Rives, an IUP shop steward, about arranging a meeting with the District. One was arranged for September 2, 2008. In the meantime, Secchitano undertook investigation, contacting Captain Colin McDermott, the pilot of the ferry on which the incidents of misconduct allegedly occurred, and Bob Wells, a deckhand on the vessel. She also spoke with Employee Relations and Diversity Program Administrator Susan Spencer regarding the sexual harassment allegation.

In assessing the merits of the case, Secchitano considered the fact that Ailes had been the subject of prior complaints by union members and that McDermott had a reputation as a

stern task master. Secchitano consulted with union counsel and concluded that the best approach was to maintain the status quo since no letter of disciplinary action had been issued to Park in the days after the incident. In advance of the scheduled meeting, Secchitano requested any written statements in the District's possession regarding the allegations. Park expressed a preference for Rives representing him in the meeting, but agreed to allow Secchitano to participate.

The District's ferry transit division maintains a "Non-Dispatch List." Based on longstanding practice, the list identifies employees ineligible to receive assignments through the hiring hall. An employee may be included for lack of security clearance, disciplinary matters, or other issues. The list states "non-dispatch" for the employee's status, followed only by the date of placement on the list. On or about August 27, 2008, Secchitano saw the latest revision to the list with Park's name entered as of August 7, 2008.

On August 29, Secchitano e-mailed District Ferry Division Deputy General Manager James Swindler indicating she had just seen the August 27 non-dispatch list and wanted to warn him of a potential grievance for the purposes of preserving its timeliness.⁴ She also advised Swindler that IUP wanted to convert the September 2 meeting into a formal grievance meeting, believing now that Park may indeed have been terminated. Secchitano made a request for a make-whole remedy. Although the dates are not clear, Secchitano engaged Swindler in informal discussions during this time seeking permission for Park's return to work.

The meeting on September 2 was attended by Park, Rives, Secchitano, Operations Manager Greg Hansard (who issued the non-dispatch list) and Spencer. District representatives explained the nature of the incidents that occurred on the vessel on August 7, the day Park was relieved of duty. McDermott was not pleased by Park's act of raising the

⁴ All dates listed hereafter are in 2008, unless otherwise indicated.

ship's flag in an upside down position and his accusation that the captain was a "bully" during a discussion about the flag sometime after. McDermott also inquired about an incident between Park and Ailes in the forecastle section of the boat which resulted in a shouting match between the two. At the end of the trip, Amadea witnessed Park make an offensive, sexually suggestive gesture with his tongue directed at Ailes. Amadea told Park she considered the gesture extremely offensive. Park denied all of the accusations.

Going into the meeting Secchitano hoped Park would let his representatives do most of the talking, as she feared he might needlessly volunteer incriminating statements. Hence she was disappointed when Park took an active role in the meeting, but more so because he leveled blame at the feet of McDermott and Ailes. While Secchitano's goal was to get the District's consent to allow Park back to work, Park's absence of contrition undermined her efforts. Near the end of the meeting, Park was asked if he was told his gesture to Ailes was offensive and whether he had apologized. Park responded by asking why he needed to apologize, claiming the situation was unfair to him. According to notes she kept of the meeting, Secchitano then defended Park by arguing that Ailes had a history of being a provocateur. Secchitano testified that Park also told her "I'm not going to kiss their ass; I'm not willing to compromise."

Citing confidentiality concerns stemming from the sexual harassment nature of Ailes' complaint, the District declined to comply with Secchitano's request for release of the witness statements generated by its investigation. Eventually, Spencer produced statements from McDermott and Amadea.

On September 8, Park e-mailed Spencer concerning the incident which he described as him giving Ailes "a silent Bronx cheer." His subject line was "Joseph McCarthy style firing." Citing a provision of the IUP contract, Park demanded copies of all written accusations against him as well as the opportunity to confront his accusers in a meeting with a stenographer. Park

included IUP members as coaddressees using the union member forum's listserv. This e-mail did not please Secchitano. She had never represented an employee who directly contacted the employer's representative. She was trying to approach the goal of reinstatement cautiously, and Park's actions raised doubts for her as to his ability to follow the employer's directives in the future. Secchitano counseled Park on several occasions not to disparage Spencer and cease his campaign against Ailes. Park insisted he would not apologize to anyone, claiming he had committed no offense.

On September 11, Swindler sent a memorandum to Secchitano in which he explained the District's determination following its investigation. After summarizing the District's findings, Swindler informed the union that Park was to remain on the non-dispatch list "indefinitely."

On September 12, Secchitano submitted a formal grievance to Swindler alleging "termination without just cause." She requested a meeting to discuss the grievance and again requested copies of all statements.

On September 13, Park e-mailed Secchitano, again copying the IUP membership, accusing her of "giving [the District] his hide." He asserted that IUP conceded his case in exchange for an economic concession from the District at the bargaining table. He signed the letter, "Willard 'The Tongue' – not 'The Tom' – Park."

Later the same day, Secchitano replied to Park (and the members) that he would be receiving a copy of Swindler's determination, the grievance, the union's request for copies of all statements, and its request for a meeting. Park responded, again with posting to the membership, proposing that while IUP waited for a response to the document request Secchitano should ask the District the same question Senator Welch famously asked Senator McCarthy regarding his lack of decency. On September 16, Park sent another e-mail to

Secchitano expressing shock that she had delayed requesting the documents for several weeks. He asked to communicate with IUP's attorney regarding the request.

On September 16, Ailes responded to the IUP membership in an e-mail questioning why the listserv had been used by Park as a forum to "post lies" and "bash fellow workers" rather than discussion of union issues. She was referring to correspondence that she believed Park was responsible for posting regarding a personal dispute between Ailes and Derrick O'Keefe. O'Keefe is an IUP member and staunch supporter of Park. Secchitano testified that at this point she still believed IUP could prevail in the grievance but that Park's behavior was having a negative impact.

Also on September 16, Swindler informed Secchitano that the District would be withholding some statements because of the requirement of confidentiality for sexual harassment victims. By e-mail dated September 17, Secchitano acknowledged the District's partial release of written statements but asserted that others, not dealing with the sexual harassment incident, still needed to be provided. Secchitano informed Park she was consulting with the union's attorney. Park responded that he wanted to be privy to further consultations with the attorney.

By letter dated September 17, Secchitano informed Park that if he had questions for the attorney, he should first propose them to her. She objected to Park's posting of the correspondence involving Ailes and O'Keefe, stating, "If you want the Union to represent you in this termination, I suggest that you stop generating any communication . . . that relates to this case." By e-mail the same day, Secchitano explained that she was waiting for a response from the attorney. Park responded that her denial of his access to the attorney was "absolute and complete bullshit" and that he distrusted her "100 percent."

Around this time, Secchitano obtained authorization from IUP to file an unfair practice charge against the District challenging the refusal to provide complete disclosure of the witness statements against Park.

By e-mail dated September 23, District Deputy General Manager Z. Wayne Johnson informed Secchitano that the District would be providing additional statements not protected by the sexual harassment disclosure policy. By e-mail dated September 24, Secchitano forwarded statements in her possession to Park. She suggested to Park that he formulate questions for the attorney in anticipation of the next meeting with the District. Park responded with a question in Latin. Secchitano objected to his "rhetorical" question as unhelpful.

On September 28, Secchitano sent an e-mail to Swindler with a cartoon (a picture of a Halloween straw-man mooning the viewer) circulated by a member and argued that such mildly offensive conduct was similar to Park's and should be tolerated.

Around this time, Park travelled to the District offices for the purpose of viewing his personnel file. By e-mail dated October 1, Park lodged a protest with Harvey Pye, an employee of the District, regarding Spencer's refusal to allow him to view his entire personnel file. Park commented that Spencer's conduct on that occasion was "oafish" ("not for the first time") and enough to "gag a maggot." He added that Spencer's "making a case" out of the tongue incident was "sick and perverted." Park forwarded a copy of the e-mail to Secchitano. Secchitano's discovery of Park's independent attempts to engage in discovery led her to conclude that Park was ignoring her previous advice. In Secchitano's mind, Park's actions demonstrated he likely could not follow the employer's directives in the future.

By letter dated October 6, Secchitano informed Park that IUP would no longer represent him. She began by recounting efforts by IUP to represent Park, including the requests for documents. She then stated:

Once we received a copy of your October 1, 2008, 1:31 p.m. e-mail to Mr. Pye, however, it became evident that it would be futile to make further efforts to attempt to persuade Golden Gate to change its position, and that there is no other meaningful recourse in this situation. While aside from the gravity of your original conduct which led to Golden Gate's disciplinary action against you, which is open to interpretation, your statements and language in the e-mail can only be characterized as insubordinate, insulting, crude and inappropriate. We do not believe there is any non-negligible chance that further pursuit of your grievance will get Golden Gate to change its mind and reinstate you to employment, and we do not believe that any arbitrator (should that be an option) would fail to find your post-discharge misconduct – the October 1, 2001, e-mail – precludes any arbitral award in your favor that would include either back-pay or reinstatement.^[5]

Secchitano ended the letter by advising Park of his appeal rights to the IUP's San Francisco Region executive board.

Park appealed, and the appeal was heard by the regional board. An hour was spent reviewing and discussing the case. Union officials advised Park to be supplicant. When asked if he was willing to accept this advice, Park answered, "Well, it depends." The appeal was denied. Park appealed that decision to the national body, which upheld the regional board's decision.

On October 22, the District officially placed Park on the non-dispatch list. According to correspondence from Swindler, the District's action left open the possibility that Park could return at some point in the future.

More than a year later in January 2010, Swindler was informed of communications by Park to members, distributed or posted at the worksite, disparaging the District's sexual

⁵ Swindler testified that Secchitano spent close to an hour of his time in various exchanges informally advocating for Park's reinstatement and reminding him of McDermott's stern reputation. Swindler testified that there was nothing in IUP's approach that affected the District's decision. In the second formal meeting with the union, which he attended, Swindler was offended by Park's apparent attempts to intimidate Spencer.

harassment training sessions (citing himself and Ailes as the primary object lesson) as well as IUP's "high priced" lawyer. He suggested collusion between Secchitano and Swindler, describing the latter as a "congenital liar."

By letter dated January 10, 2010, Swindler wrote to Secchitano informing her that Park had been placed on the non-dispatch list permanently. At the hearing, Park asserted that IUP failed to grieve this action.

At the hearing Park repeated his claim of collusion between IUP and the District. He presented two witnesses in an attempt to show that he was treated less favorably in representation because he had been a union dissident. The IUP members provided no evidence to establish more favored treatment by the union.

Park also presented O'Keefe as a witness for his opinion that IUP failed to process Park's grievance in a timely fashion. There is no evidence Park's grievance was ever in jeopardy of being procedurally defaulted. O'Keefe further testified he was reprimanded by Swindler (who "screamed at him") in January 2010 based on suspicion that he participated in the distribution of the leaflets urging members to support Park at his unfair practice hearing in the charge against the District.

ISSUE

Did the IUP breach its duty of fair representation owed to Park with respect to his grievance against the District?

CONCLUSIONS OF LAW

The complaint alleges that IUP breached its duty of fair representation by ceasing representation of Park in the grievance over his placement on the non-dispatch list.

MMBA unions "owe a duty of fair representation to their members." This duty requires them to refrain from representing their members arbitrarily, discriminatorily, or in bad

faith. (*Hussey v. Operating Engineers Local Union No. 3* (1995) 35 Cal.App.4th 1213 (*Hussey*); see also *Service Employees International Union, Local 616 (Jeffers)* (2004) PERB Decision No. 1675-M.) The exclusive representative's duty to fairly represent bargaining unit members extends to grievance handling. (*Fremont Unified District Teachers Association, CTA/NEA (King)* (1980) PERB Decision No. 125.)

To establish a violation in the grievance handling context, the charging party must show that the union's conduct was arbitrary, discriminatory, or in bad faith. (*United Teachers of Los Angeles (Collins)* (1982) PERB Decision No. 258.) As PERB explained:

Whether a union has met its duty [of fair representation in grievance processing] depends not upon the merits of the grievance but rather upon the union's conduct in processing or failing to process the grievance. Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations.]

A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal. [Citation.]

(*Ibid.*; see also *International Association of Machinists (Attard)* (2002) PERB Decision No. 1474-M, citing *Hussey, supra*, 35 Cal.App.4th 1213.) The *Hussey* court stated:

A union is accorded wide latitude in the representation of its members, and courts are reluctant to interfere with a union's decisions in representing its members absent a showing of arbitrary exercise of the union's power. [Citation.]

(35 Cal.App.4th at p. 1219.)

With respect to the refusal to process a grievance, an aggrieved unit member must show how the exclusive representative's decision was "without rational basis or devoid of honest judgment." (*International Association of Machinists (Attard)*, *supra*, PERB Decision

No. 1474-M; see also *California Faculty Association (Wunder)* (2007) PERB Decision No. 1889-H [union not obligated to elevate a grievance when it has doubts as to the merits].)

Much of Park's presentation at the hearing focused on events beginning in late 2009 and into early 2010, around the time his formal hearing of the charge against the District. It appeared the purpose of this showing was to demonstrate District-IUP collusion and IUP's animus toward Park based on his and O'Keefe's attempt to rally support for his PERB case. These events were admitted over objection as relevant to the overall showing of bad faith.

Following his reprimand of O'Keefe, Swindler changed Park's status on the non-dispatch list from "indefinitely" to "permanently." Park alluded to the fact that IUP never filed a grievance when Swindler took this action. This allegation was never raised in the charge or the complaint and Park never gave notice of his intent to litigate the matter prior to the hearing. Therefore, even making allowances for his unrepresented status in the case, there is no good cause for permitting litigation of the issue. (*Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668; *Gonzales Union High School District* (1984) PERB Decision No. 410 [facts set out in original charge]; *Trustees of the California State University* (2010) PERB Decision No. 2151-H [facts not set out in original charge].)

The gravamen of the complaint is that IUP breached its duty of fair representation by ceasing prosecution of Park's grievance challenging his placement on the non-dispatch list as a result of the incidents involving Ailes in August 2008. IUP made a decision in this case to cease representation, informed Park of that decision, and explained its reasons. Thus, IUP exercised its discretion as the exclusive representative whether or not to pursue the grievance. In such cases, the burden is on the charging party to demonstrate how the union abused its discretion. (*United Teachers – Los Angeles (Wylar)* (1993) PERB Decision No. 970.)

The union's filing of a grievance does not constitute an unequivocal judgment as to the merits of the grievance. (*California State Employees Association (Cohen)* (1993) PERB Decision No. 980-S.) A union may withdraw a grievance if new information casts doubts on the merits of the case. (*Ibid.*) However, a union may not refuse to process a grievance for conduct on the part of the employee that it views as disloyal. (*California Union of Safety Employees (Baima)* (1993) PERB Decision No. 967-S [threat of litigation].)

Park has failed to demonstrate that IUP abused its discretion in declining to proceed with his grievance. Park does not dispute the actions about which IUP registered its concern – his demands directly to the District for production of witness statements and his campaign to solicit support of other union members in his defense against a disciplinary action arising from a complaint by another union member – and indeed, based on his militant actions throughout the matter, he appears to have viewed his self-advocacy as courageous in the face of union and management collusion.

Regardless of the merit of that view, IUP's representation undoubtedly rested on different concerns based on Secchitano's strategy for obtaining Park's reinstatement. District deckhands are at will employees with a tenuous hold on continued employment. They receive short-term ferry boat assignments based on bids at the union hall. The District maintains the list of those eligible and ineligible to bid on jobs. Secchitano adopted a wait-and-see policy initially, while Park presented a grievance which characterized Amadea's discipline as a termination. No notification of formal action was issued until the non-dispatch list approximately three weeks after the boat incident and following Spencer's investigation of the charge of sexual harassment. In Secchitano's mind this still did not obviate the potential for an expeditious reinstatement. Nevertheless, Secchitano responded with her demand that the meeting scheduled for September 2 be treated as a grievance meeting. During that meeting,

the District laid out the basis of its action against Park. To Secchitano's chagrin, Park took an active role in the meeting and foiled Secchitano's hope that a show of contrition might result in reinstatement to the bid list. Park was unrepentant.

Because Park was intent on fully litigating his dispute he followed the meeting with his September 8 e-mail to Spencer demanding the witness statements that had prompted his "McCarthy-style firing." As Secchitano testified, this communication raised doubts about the viability of her strategy for a mediated reinstatement, one that was contingent upon the District believing Park capable of following the District's directives. Regardless of whether the incident actually involved sexual harassment or insubordination, Park's conduct cast doubt on his being viewed as amenable to rehabilitation. Park adopted the righteous approach, but it conflicted with Secchitano's pragmatic one.

With the courses set in this fashion, the events that followed Swindler's letter of adverse findings were predictable. Park escalated his demands for proof of wrongdoing by visiting the District office to inspect his personnel file. In the process he described Spencer as oafish and forwarded Secchitano his October 1 e-mail to Pye. That e-mail, coming after Secchitano's warning to cease personally-generated communications concerning his case, triggered IUP's decision to cease prosecution of the grievance. In the letter to informing Park of the decision, Secchitano reiterated her concern about Park's counterproductive approach to the case, citing his conduct toward Pye as insubordinate, insulting, and crude. She added that Park's post-discharge misconduct in the union's view would prevent an arbitrator from finding in his favor.

The relationship conflict between grievant and union representative here provides an apt occasion to emphasize that the union retains authority to make strategic and tactical decisions within its duty of fair representation. As *United Teachers of Los Angeles (Collins)*,

supra, PERB Decision No. 258 reminds, a breach is not dependent solely on the merits of the grievance, but whether the union has processed the grievance in a good faith manner. So long as a decision to withdraw from a grievance appears to have rational basis and there is no evidence it is otherwise arbitrary or based on invidious discrimination, no violation will be found. (*California School Employees Association & its Chapter 168 (Gibson)* (2010) PERB Decision No. 2128.)

Consistent with Park's history of advocacy generally, he viewed his case as an opportunity for collective action aimed at illuminating the employer's arbitrary practices. However, IUP had more pragmatic concerns, including how to achieve a successful outcome when the impetus for the disciplinary action was the complaint by another member. Given such, IUP's strategy was objectively sensible and non-arbitrary. In contrast, accommodation of interests was not in Park's contemplation.

I further conclude that IUP had a rational basis for believing that further processing of Park's grievance would be futile. Park never disputed that he stuck his tongue out at Ailes; the only question is whether it amounted to sexual harassment, a matter subject to interpretation as Secchitano reminded Park in her October 6 letter. The grievance was not clearly meritorious, only arguably meritorious. In this context, I have no basis to dispute IUP's opinion that an arbitrator would find Park's post-discharge misconduct detrimental to the case.

I also find no evidence of invidious discrimination on IUP's part, notwithstanding Park's history of dissident activity. Secchitano intervened promptly and vigorously in the matter, including obtaining authority to file an unfair practice charge to compel production of the witness statements.

Accordingly, I find that IUP did not breach its duty of fair representation in regard to Park's alleged misconduct while on duty.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CO-191-M, *Willard Park v. Inlandboatmans Union of the Pacific*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subd. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)